(4)

No. 90-1360

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

STEPHEN K. CARR
Counsel of Record
HAIGHT, GARDNER, POOR
& HAVENS
195 Broadway
New York, New York 10007
(212) 341-7000

JOHN J. GIBBONS
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, New Jersey 07102-5311
(201) 596-4500

Counsel for Petitioner

Of Counsel:

MICHAEL D. LOPRETE
RICHARD A. MENCHINI
ALAN HEBLACK
JOHN T. WOLAK

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Introduction	1
Argument	2
Conclusion	6

TABLE OF AUTHORITIES

Cases: PAGE

Baker v. Carr, 369 U.S. 186 (1962) 5

Berkovitz v. United States, 486 U.S. 531 (1988)..... 3

In Re Joint E. and S. Dists. Asbestos Litigation, 891 F.2.d 31 (2d Cir. 1989) 5

Lane v. United States, 529 F.2d 175 (4th Cir. 1975).. 4

Tiffany v. United States, 1991 U.S. App. LEXIS 7819 (4th Cir. April 30, 1991).....2, 3, 4, 5

United States v. Gaubert, 59 U.S.L.W. 4244 (U.S. March 26, 1991), *rev'g*, 885 F.2d 1284 (5th Cir. 1989)..... 3

Statutes

Federal Tort Claims Act, 28 U.S.C. § 2680(a) 3

Suits in Admiralty Act, 46 U.S.C. App. § 741 *et. seq.* 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1360

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTION

In the Brief for the United States in Opposition to Sea-Land's Petition for a Writ of Certiorari ("Opp. Brief"), relying on the results in several cases decided in its favor, the United States contends that "there is nothing anomalous in the recognition of the [discretionary function exception] in the [SAA], even in the absence of an express exception" (Opp. Brief at 8). In thus relying on caselaw, however, the United States completely ignores a fundamental flaw in its own analysis and that of the several circuit courts of appeals which have concluded that the separation of powers doctrine provides an appropriate basis for imputing the discretionary

function exception into the Suits in Admiralty Act ("SAA"), 46 U.S.C. App. § 741 *et seq.* The Solicitor General simply fails to address the separation of powers arguments in the petition for certiorari.

For additional support, the United States has submitted a Supplemental Brief ("Supp. Brief") in which it has identified a recent Fourth Circuit opinion, *Tiffany v. United States*, 1991 U.S. App. LEXIS 7819 (4th Cir. April 30, 1991). The court in *Tiffany* continues and compounds the flawed analytic approach of the other circuit courts of appeals and relies upon principles which have no application to the proper construction of the SAA.

ARGUMENT

A. SEPARATION OF POWERS DOCTRINE

Rather than address the constitutional arguments raised by petitioner, the United States simply adopts the reasoning of the various courts of appeals which have held that the SAA, which acts as a general waiver of the sovereign immunity of the United States with respect to certain maritime claims, does not waive the government's sovereign immunity with respect to claims arising from the performance of discretionary functions (*See* Opp. Brief at 6). The United States concludes that this result is warranted because of "the need to avoid judicial intrusion into executive policy making [which] implicates important principles of separation or powers" (Opp. Brief at 9). Without any further analysis or explanation of how the discretionary function exception protects the principles embodied in the separation of powers doctrine, the United States suggests that "prevailing interpretation of the SAA gives due weight to those considerations" (Opp. Brief at 10).

As demonstrated in petitioner's argument to the Court, "[p]rinciples of separation of powers, as definitively announced by this Court, have no application to the proper construction of the SAA" (Petition at 15). The doctrine has

been utilized by this Court to review the constitutionality of congressional legislation in two discrete circumstances: (1) when a particular statute may violate specific textual provisions of the Constitution which vest authority in another branch; and (2) when a particular statute may violate non-textual, functional principles of separation of powers. As demonstrated in the petition filed by Sea-Land, neither of these circumstances are present in this case (*See* Petition at 15-18). The United States does not dispute that assertion.

Reliance upon the principles of separation of powers as a basis for reading a discretionary function exception into the SAA is an aberrational doctrinal development which contravenes not only the literal language of the statute but also this Court's recent decision in *United States v. Gaubert*, 59 U.S.L.W. 4244 (U.S. March 26, 1991), *rev'g* 885 F.2d 1284 (5th Cir. 1989). In *Gaubert*, the Court considered the origins of the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The Court stated that "when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.' " *Id.* at 4246 (quoting *Berkovitz v. United States*, 486 U.S. 531 (1988)). There is no suggestion that the exception was developed to grant immunity for negligent acts occurring in circumstances unrelated to policy-making. Moreover, nowhere in the Court's opinion is there any suggestion that the discretionary function exception was designed as a guardian of the doctrine of separation of powers. *See id.* at 4246-47. The Court must stop the continued extension of non-existent legal doctrines and the distortion of unambiguous statutes.

B. CIRCUIT COURT RULINGS

In its Supplemental Brief, the United States cites the case of *Tiffany v. United States*, 1991 U.S. App. LEXIS 7819 (4th Cir. April 30, 1991) (Supp. Brief at 1-25a), and states that this opinion "lends additional support to our position that there is no conflict between the Fourth Circuit and other circuits that calls for this Court's review" (Supp. Brief at 2).

Yet, the Fourth Circuit in *Tiffany* did not overrule its decision in *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975), which held that a discretionary function exception could not be implied into the SAA (Petition at 22). Rather, in *Tiffany* the court merely recognized the existence of a discretionary function exception to the SAA "in some circumstances" (Supp. Brief at 12a fn.). None of the other courts of appeals which have ruled on this issue has expressed the view that a discretionary function exception may be selectively applied by the courts in maritime actions brought against the United States. Therefore, the Fourth Circuit itself has now reaffirmed the continued validity of *Lane* in some maritime actions brought pursuant to the SAA. Accordingly, despite the government's assertion to the contrary, there remains a real conflict which needs to be resolved by this Court.

Even if it could be said that the Court of Appeals for the Fourth Circuit has now aligned itself with the other courts of appeals on the discretionary function issue, a review of the *Tiffany* opinion indicates that the court merely adopted the holdings of the other circuits and did not independently address how the separation of powers doctrine, as developed by this Court, requires writing a discretionary function exception into the SAA. Thus, the Fourth Circuit's opinion actually supports petitioner's request that this Court review this issue.

In *Tiffany*, the plaintiff sought to recover damages in tort from the United States for negligence by the military in conducting defensive intercept maneuvers. The court began its analysis by considering the relation between separation of powers principles and the relevant federal statutes (Supp. Brief at 10a). Noting that the SAA allowed the action to proceed without a sovereign immunity bar, the court went on to consider whether the separation of powers doctrine would nevertheless prevent the courts from exercising jurisdiction under the SAA in certain circumstances (Supp. Brief at 10-11a). In defining the relevant considerations informing the separation of powers analysis, the court did not refer either to specific textual provisions of the Constitution or to the

non-textual functional principles of separation of powers. Instead, the court listed several factors relevant to the determination of justiciability of political questions (Supp. Brief at 10-11a) (*citing Baker v. Carr*, 369 U.S. 186, 217 (1962)), and concluded that if resolution of the issues presented offended these or other prudential considerations, the court would deem the issues nonjusticiable. In addition, the court noted that "[e]ach circuit that has considered the matter has concluded that actions brought under the SAA which would require the court to re-examine discretionary acts taken by the government must be dismissed" (Supp. Brief at 12-13a) (listing citations to the several courts of appeals). In light of these factors, the Fourth Circuit concluded that independent judicial review of administrative and legislative policy making decisions "would be 'intolerable under our constitutional system of separation of powers' " (Supp. Brief. at 13a) (*quoting In Re Joint E. and S. Dists. Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989)). In so holding, the court memorialized the extraordinary proposition that it would be *unconstitutional* for Congress to provide for judicial review of a military decision which results in the destruction of a friendly aircraft.

The *Tiffany* opinion, like the opinion below of the Third Circuit, continues the distortion of a clear and unambiguous statute and clearly defined principles relating to the separation of powers doctrine. Only this Court can protect Congress and its constituency from aggrandizing acts of the federal executive uncontrolled by any defined principle of law.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN K. CARR
Counsel of Record
HAIGHT, GARDNER, POOR
& HAVENS
195 Broadway
New York, New York 10007
(212) 341-7000

JOHN J. GIBBONS
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, New Jersey 07102-5311
(201) 596-4500

Counsel for Petitioner

Of Counsel:

MICHAEL D. LOPRETE
RICHARD A. MENCHINI
ALAN HEBLACK
JOHN T. WOLAK